COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0628-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IVORY SUTTLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and TIMOTHY G. DUGAN, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

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[1] The Honorable Patricia D. McMahon entered the judgment of conviction; the Honorable Timothy G. Dugan entered the order denying the motion for postconviction relief.

PER CURIAM. Ivory Suttle appeals from a judgment of conviction for first-degree intentional homicide while using a dangerous weapon. He also appeals from an order denying his motion for postconviction relief. Suttle contends that the trial court erred because it: (1) failed to dismiss the entire jury panel due to potential prejudice; (2) failed to admit a witness statement under an exception to the hearsay rule; and (3) erroneously exercised discretion in sentencing him to life imprisonment with a parole eligibility date of May 16, 2046.

I. BACKGROUND

On October 21, 1991, Reginald Hopkins arrived at a local tavern to pick up his sister, Sabrina, and her two friends, Stormi Henry and Jenise Perry. As the women left the tavern, Suttle grabbed Henry. She pulled away but Suttle continued to taunt and curse the women. When Hopkins got out of the car to see what the problem was, Suttle threatened him and then pulled a gun from his (Suttle's) waistband. Hopkins fled.

Suttle pursued Hopkins, chasing him across a vacant lot and into an alley, shooting at Hopkins throughout the chase. Sabrina Hopkins and Stormi Henry ran after them shouting for Suttle not to hurt Hopkins. The two women soon lost sight of Suttle and Hopkins, but they continued to run in the direction of gunfire.

Perry, who had ducked behind a car as Suttle ran by, got into Hopkins's car and began to search for Hopkins and Suttle. Driving south on Richards Street, Perry spotted Suttle standing over Hopkins, who had fallen to the pavement. As Hopkins struggled to get away, Suttle fired two shots into the air and then fired a third shot at Hopkins's back. The bullet hit Hopkins in the mid-

back, pierced his right lung and exited through his chest. Perry immediately drove to a police station and reported what she had seen.

Following the sound of gunfire, Sabrina Hopkins and Stormi Henry entered Richards Street and found Hopkins lying on the pavement. When Suttle threatened to "finish his business," Sabrina pleaded with him not to shoot her brother again. Only upon hearing that Reginald Hopkins was "folks," a term referring to a member of a gang, did Suttle leave. Hopkins died moments later from loss of blood.

II. ANALYSIS

Suttle first argues that he did not receive a trial by an impartial jury due to potential prejudice during *voir dire*. When asked if any of the jurors knew Suttle, a juror responded: "I believe I know him. I was a nurse at the House of Correction. I believe I know him from there." Although comments made in *voir dire* may be prejudicial, a party must preserve the claim for appeal by voicing an objection. ***State v. Olexa***, 136 Wis.2d 475, 482, 402 N.W.2d 733, 736 (Ct. App. 1987) (deeming waived an argument that the defendant was denied an impartial jury because an objection was not voiced at *voir dire*). Suttle did not object or move that the trial court dismiss the panel; therefore, he waived his objection. ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989) ("Failure to object at the time of the alleged improprieties . . . waives review of that alleged error.").

Suttle next argues that the trial court erroneously excluded an out-of-court statement made by witness April Criss that, he contends, was admissible under the residual hearsay exception, RULE 908.045(6), STATS.[2] We disagree.

The decision to admit hearsay evidence is within the trial court's discretion and will not be reversed unless the trial court erroneously exercised discretion or based its decision on an erroneous view of the law. ***State v. Buelow***, 122 Wis.2d 465, 476, 363 N.W.2d 255, 261 (Ct. App. 1984). RULE 908.045(6), STATS., provides that "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness" is not excluded by the hearsay rule; however, the residual hearsay exception, "is not a 'catch all' or 'near miss' category that permits the admissibility of otherwise unacceptable hearsay." ***State v. Stevens***, 171 Wis.2d 106, 120, 490 N.W.2d 753, 760 (Ct. App. 1992). The exception is to be used only under exceptional circumstances where the proponent has firmly "establish[ed] circumstantial guarantees of trustworthiness . . . ." ***Id.*** Because the circumstances surrounding the making of a hearsay statement govern whether a hearsay exception is appropriate, *see* ***id.***, we look to the circumstances in question.

Four or five days after the shooting and while using a false name, April Criss told police that shots were fired from a large white car at the time of the crime. She then disappeared. Although Suttle contends that nothing indicates that Criss's statement is any less reliable than those of other witnesses, the fact

[2] At trial, Suttle argued that the statement should be admitted both under RULE 908.45(2), STATS., (exception for statements of recent perception), and RULE 908.045(6), STATS., (exception for residual hearsay). On appeal, however, Suttle did not challenge the trial court's ruling that Criss's statement did not qualify as a statement of recent perception under RULE 908.045(2), STATS., and, therefore, we do not decide this issue.

that Criss lied about her identity when giving the statement undermines her trustworthiness. Further, the evidence does not corroborate Criss's statement. No other testimony places a car where Criss does, nor do the locations of the spent casings corroborate Criss's statement. Given the absence of sufficient circumstantial guarantees of trustworthiness, we conclude that the trial court properly exercised discretion by excluding Criss's statement.

Finally, Suttle argues that the sentencing court erroneously exercised discretion in setting his parole eligibility date at May 16, 2046, contending that the parole board should decide his parole eligibility date. Suttle also claims that when the court set the parole date, it did not consider his extensive history of mental illness and the possibility of successfully treating the illness while in prison or on probation. We disagree.

Sentencing is a discretionary act and our review is limited to determining whether the trial court erroneously exercised discretion. ***State v. Barnes***, 203 Wis.2d 132, 145, 552 N.W.2d 857, 862 (Ct. App. 1996). Parole eligibility date determinations are reviewed under the same standard as other sentencing decisions. ***State v. Setagord***, 211 Wis.2d 397, 416, 565 N.W.2d 506, 514 (1997). Because there is a strong policy against interfering with a trial court's sentencing discretion, ***Harris v. State***, 75 Wis.2d 513, 518, 250 N.W.2d 7, 10 (1977), sentencing decisions are afforded a strong presumption of reasonability, ***State v. Borrell***, 167 Wis.2d 749, 781-82, 482 N.W.2d 883, 895 (1992).

The primary factors a trial court considers in fashioning a sentence are the gravity of the offense, the character of the offender, and the need to protect the public. ***Borrell***, 167 Wis.2d at 773, 482 N.W.2d at 892. A court may also consider the vicious or aggravated nature of the crime, as well as the defendant's

personality, social traits, and need for rehabilitation. ***State v. Killory***, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). A court evaluates these same factors in setting a parole eligibility date. *See* ***Setagord***, 211 Wis.2d at 416, 565 N.W.2d at 514.

We conclude that, in setting the parole eligibility date for Suttle, the trial court did not erroneously exercise discretion. The trial court thoroughly examined the sentencing factors and applied them to Suttle and his crime. The trial court considered Suttle's "refusal of treatment, failure to cooperate, [and] failure to take appropriate medication." The court considered Suttle's mental illness, but determined that any mental health issues were outweighed by the gravity of the crime, the need to protect the public, and the need to deter others from similar crimes of senseless violence. Suttle had a significant prior record, abused drugs and alcohol, and routinely carried firearms. Suttle deliberately pursued and executed Reginald Hopkins, a helpless victim who had sought only to assist his sister and her friends.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.